Editor's note: Reconsideration denied by Order dated July 10, 1991.

RUBY DRILLING CO.

IBLA 89-145 Decided May 8, 1991

Appeal from a decision of the Nevada State Office, Bureau of Land Management, denying a request for suspension of drilling obligations associated with the Gold Butte Unit. N-46214, N-7895, et al.

Affirmed as modified.

1. Oil and Gas Leases: Suspensions

   A suspension of a lease in order to allow more time for the drilling of a well cannot be authorized under 30 U.S.C. § 209 (1988) because a suspension under that section does not allow any lease activity. Nor can such a suspension be authorized under 30 U.S.C. § 226(f) (1988), when there is neither production or a well capable of production. Where BLM has issued decisions purporting to grant suspensions and extensions of leases that are unauthorized by law, the decisions are ultra vires and have no legal effect.

2. Oil and Gas Leases: Unit and Cooperative Agreements

   A suspension of drilling obligations pursuant to the section of the unit agreement entitled "Unavoidable Delay" is not justified by the unit operator's inability to obtain adequate funds to drill a well, or by various difficulties which were not objectively preventing drilling operations at the time the suspension request was filed.

APPEARANCES: Jesse D. Ruby, Gillette, Wyoming, for Ruby Drilling Company; David Weston, Fresno, California, for Petrodyne Corporation; Mitchell Kovaleski, North Hollywood, California, for Kovaleski Trust.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Ruby Drilling Company (Ruby) 1/ has appealed a September 22, 1988, decision of the Nevada State Office, Bureau of Land Management (BLM).

1/ Pursuant to section 22 of the Gold Butte Unit Agreement, Ruby has the right, after notice to other parties affected, to appear before the Department for and on behalf of any and all affected interests. No notice

Ruby is the unit operator of the Gold Butte Unit (N-46214), contract No. NV050P32-87U667, located in Clark County, Nevada.

The Gold Butte Unit Agreement was approved by BLM on February 5, 1987, and states in part:

> DRILLING TO DISCOVERY. Within 6 months after the effective date hereof, the Unit Operator shall commence to drill an adequate test well at a location approved by the AO [authorized officer], unless on such effective date a well is being drilled in conformity with the terms hereof, and thereafter continue such drilling diligently until the 100' of the Devonian Muddy Peak limestone has been tested or until at a lesser depth unitized substances shall be discovered which can be produced in paying quantities * * *.
>
> The AO may modify any of the drilling requirements of this section by granting reasonable extensions of time when, in his opinion, such action is warranted.
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> * * * Upon failure to continue drilling diligently any well commenced hereunder, the AO may, after 15-days notice to the Unit Operator, declare this Unit Agreement terminated. [Emphasis in original.]

(Unit Agreement, Section 9). 2/

By letter filed with BLM on July 29, 1987, Ruby requested 60-day extensions of both the unit drilling obligation and the leases. On July 31, 1987, BLM granted "the requested extensions and suspension" pursuant to 43 CFR 3186 and 3103.4. BLM stated, "The 60-day extension for leases held within the Gold Butte Unit is approved. These leases will expire on midnight of September 29, 1987, unless drilling is taking place pursuant to 43 CFR 3107.1" (Decision of July 31, 1987, at 2). The drilling obligation under the unit agreement was extended until October 4, 1987.

Although we find no record of requests for extensions, by decision dated October 9, 1987, BLM stated:

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fn. 1 (continued)
of Ruby's intent to appear on behalf of the lessees was contained in the notice of appeal and no other notice of appeal or appearance document was filed. Nonetheless, representatives of two lessees, Petrodyne Corporation (Petrodyne) and the Kovaleski Trust, have signed one of the statements of reasons along with Ruby. Timely filing of a notice of appeal is jurisdictional. Lyman J. Ipsen, 96 IBLA 398, 400-401 (1987). As no notice of appeal was filed on behalf of these entities, they are not properly parties before this Board.

2/ A model unit agreement is set forth at 43 CFR 3186.1.

> We have allowed one final extension of both the leases and the 6-month unit drilling commitment. The leases will expire November 30, 1987, and the unit will terminate according to section 9 on December 4, 1987, unless drilling is taking place. We expect to approve no further extensions for either the leases or the unit obligation.

An October 16, 1987, decision discussed various other matters relating to the unit and leases, and reiterated that the extensions had been granted. An appeal of the October 16, 1987, decision was filed by J. L. Macintosh on behalf of the Gold Butte Association and Ruby. A second appeal by lessee Mary Dolbow was filed on November 16, 1987. The matter was assigned docket number IBLA 88-105. On December 3, 1987, the Deputy State Director, Mineral Resources, met with participants of the Gold Butte Unit and representatives of the Nevada Department of Minerals. As a result of an agreement reached at that meeting, a request to dismiss the appeal was filed. By order dated January 15, 1988, this Board dismissed the appeal. Thereafter, BLM issued its decision of March 8, 1988, which stated:

> Based on your motion to dismiss the appeal of November 16, 1987 (IBLA#88-105), subsequent approval of this dismissal request by the IBLA and per meeting with Tom Leshendok on December 3, 1987, we are extending the above-listed leases one final time to May 31, 1988, and the Gold Butte Unit initial six month drilling obligation date one final time to June 1, 1988. [Emphasis in original.]

Well 36-1 was spudded on May 30, 1988, and drilled to 119 feet by early afternoon on June 1, 1988. By letter dated June 3, 1988, Ruby requested that BLM confirm the unit and leases had been extended by drilling over midnight of the deadlines. Petrodyne requested advice from the Regional Solicitor concerning extensions available under the unit agreement in a letter dated June 6, 1988.

By letter dated August 18, 1988, Ruby was provided the following notice:

> Presently, from field investigations conducted by BLM personnel, we question whether diligent drilling operations are being conducted on the 36-1 well. In order for unit and lease extensions to come to completion, diligent drilling operations to the unit objective on the 36-1 well must proceed in a very timely manner. A sundry notice request to change the casing design program should be submitted to this office by September 1, 1988, and a rig capable of drilling to the aforementioned unit objective (and taking into consideration the proposed change in the casing design program) must be actively diligently drilling the 36-1 well as of midnight on September 15, 1988.

(Notice of Aug. 18, 1988, at 2).

By letters dated September 9 and 10, 1988, appellant requested suspension of unit drilling obligations pursuant to unit agreement section 25. Section 25 of the unit agreement states:

> UNAVOIDABLE DELAY. All obligations under this agreement requiring the Unit Operator to commence or continue drilling, or to operate on, or produce unitized substances from any of the lands covered by this agreement, shall be suspended while the Unit Operator, despite the exercise of due care and diligence, is prevented from complying with such obligations, in whole or in part, by strikes, acts of God, Federal, State, or municipal law or agencies, unavoidable accidents, uncontrollable delays in transportation, inability to obtain necessary materials or equipment in the open market, or other matters beyond the reasonable control of the Unit Operator, whether similar to matters herein enumerated or not.

In the September 9, 1988, letter requesting a suspension of drilling obligations under the unit agreement, the unavoidable delay cited was, "Ruby Drilling Company recently was informed by its financial backers for the Gold Butte Unit that funds to drill the 36-1 well would not be available * * *" (Letter of Sept. 9, 1988, at 1). In the September 10, 1988, letter submitted in support of suspension, low oil prices are discussed, followed by: "Ruby Drilling Company has endured a number of other#[**8]#hardships over the past several years including major vandalisms of drilling equipments [sic], sabatoge [sic], loss of financial backing a number of times, uncooperative and unreasonable unit participants, and extremely difficult and unpredictable drilling conditions" (Letter of Sept. 10, 1988, at 1).

The appealed decision denies the suspension request and then repeats the August 18 notice that a rig capable of drilling to the unit objective must have been actively and diligently drilling the 36-1 well as of midnight September 15, 1988, in order to prevent termination of the 14 leases and the Gold Butte Unit as of May 30 and 31, 1988, respectively.

In a decision dated November 8, 1988, BLM confirmed that the Gold Butte Unit Agreement had terminated automatically effective May 31, 1988, according to the terms of section 9 of the unit agreement. 3/ It also

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3/ Ruby presents various arguments disputing the decision that the unit had terminated. With one exception, we find no error in the BLM determination. Pursuant to section 9 of the unit agreement, if the operator fails to continue diligently drilling a well begun under the unit agreement, the AO may declare the unit agreement terminated after providing 15 days notice to the unit operator. BLM's letter of Aug. 18, 1988, provided Ruby with more than sufficient notice.

However, despite the requirement that the operator be given 15 days' notice, BLM declared the unit terminated on May 31, 1988. It is inappropriate to declare the unit terminated prior to completion of the notice period. Thus, the decision is hereby modified to make the termination effective Sept. 15, 1988.

stated that the 14 subject leases expired May 30, 1988, "because necessary diligent drilling operations to the unit objective on the 36-1 well did not take place as of midnight of September 15, 1988" (Nov. 8, 1988, Decision at 2).

We note initially that the suspension of the unit and the extension of the 14 leases involve totally different considerations. We will examine the issues surrounding BLM actions with respect to the individual leases first.

[1] While BLM cited 43 CFR 3103.4 as its authority to suspend the leases in question, this regulation would not grant BLM the authority it purportedly exercised. This regulation implements the statutory suspension provisions set forth at section 17(f) and section 39 of the Mineral Leasing Act. See 30 U.S.C. § 226(f) (1988) and 30 U.S.C. § 209 (1988). Neither of these provisions would seem to be applicable to this case. As Solicitor Richardson explained in Oil & Gas Lease Suspension, 92 I.D. 293 (1985), 30 U.S.C. § 209 (1988) permits a suspension of lease operations and production, solely for the purposes of conservation, and no lease activity may be allowed during the period of suspension. 92 I.D. at 298-99. While 30 U.S.C. § 226(f) (1988) does permit suspension of either operations or production, the suspension herein could not have been a suspension of production since "there must be production before such a suspension may be granted." Id. at 301. Moreover, since the suspension purportedly granted by BLM clearly contemplated continued attempts to drill a well, it could not be a suspension of operations since, as the Solicitor expressly noted, "[i]n the absence of a well capable of production, a suspension of operations that allowed lease activity would be a contradiction in terms." Id. Thus, inasmuch as the suspension of the lease (as opposed to the unit drilling obligations) was unauthorized in law, it was ultra vires and of no legal effect. BLM's subsequent attempts to simply extend the lease are equally flawed as there is no statutory or regulatory authority which even colorably authorizes the purported extensions. Thus, the leases must be deemed to have expired upon the running of their primary terms at midnight on July 31, 1987.

[2] With respect to the termination of the unit, we affirm BLM's conclusion that a suspension of drilling obligations pursuant to section 25 of the unit agreement cannot be granted in order to allow the operator to find alternative funding sources. Insufficient funds will not excuse a lessee's failure to timely perform drilling obligations. See Champlin Petroleum Co. v. Mingo Oil Producers, 628 F. Supp. 557 (D. Wyo. 1986), aff'd, 841 F.2d 1131 (10th Cir. 1987); Alphin v. Gulf Refining Co., 39 F. Supp. 570, 576 (W.D. Ark. 1941); Williston on Contracts, § 1932 (3rd ed. 1978); Colorado Open Space Council, 109 IBLA 274, 313-14 (1989) (Irwin, A. J., dissenting). Moreover, appellant does not allege a situation or circumstance that prevented the diligent drilling of the 36-1 well, as required in section 25 for a suspension. Appellant only alleges its inability to find someone else to fund the drilling.

Appellant cites several difficulties it has encountered in the past in conducting operations on the Gold Butte Unit. However, it has not

established that any of these difficulties were objectively preventing the drilling of the obligation well at the time the suspension request was filed. It is insufficient to simply allege that performance has been difficult "over the past several years." It is clear, for example, that the vandalism to which Ruby's equipment was subjected occurred in November 1987. We are unable to find that 10 months afterward an operator exercising due care and diligence would still be prevented by the vandalism from complying with the drilling obligation, especially where drilling occurred in the intervening period.

Other arguments presented by appellant have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of September 22, 1988, is affirmed as modified.

John H. Kelly
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge